Supreme Court, U.S.
FILED
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CALVIN GRIGSBY,

Petitioner,

v.

MIAMI-DADE COUNTY, FLORIDA, STEVEN B. BASS, ALEX PENELAS, KATHY JACKSON, MIRIAM ALONSO, RACHEL BAUM, and DELOITTE & TOUCHE, L.L.P.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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July 26, 2004

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QUESTIONS PRESENTED FOR REVIEW

[THE ESSENTIAL FACTS: An attorney employed by Miami-Dade County, Florida supplied false evidence to federal prosecutors to instigate a malicious prosecution, which resulted in an alleged Fourth Amendment "continuing seizure" of the accused that lasted until the dismissal of the criminal charges.]

1 Under this Court's 1994 opinions in *Albright v. Oliver*, does a Fourth Amendment "continuing seizure" occur when a maliciously prosecuted person is forced to surrender his person to authorities, satisfy bail requirements, surrender his passport, report to a pretrial services unit on a weekly basis, appear in court for many days over many months, and suffer loss of business and employment opportunities, reputational harm, and the financial and emotional stress of preparing and presenting a defense to fabricated charges?

2. Where a County attorney acts solely as a complaining witness to instigate a federal prosecution, is he entitled to absolute immunity from a charge that he fabricated and supplied false evidence, in light of this Court's instructions in cases such as *Malley v. Briggs* (1986) and *Kalina v. Fletcher* (1997)?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The petitioner (Plaintiff/Appellant below) is:

Calvin Grigsby

The respondents (Defendants/Appellees below) are:

Steven B. Bass
Alex Penelas
Kathy Jackson
Miriam Alonso
Rachel Baum
Miami-Dade County, Florida
Deloitte & Touche, L.L.P.

The other Plaintiff/Appellant below is:

Fiscal Operations, Inc.

RULE 29 CORPORATE DISCLOSURE STATEMENT

The following Plaintiff/Appellant in the proceeding below is a non-governmental corporate party:

Fiscal Operations, Inc.

Fiscal Operations, Inc. is a wholly-owned subsidiary of another private company, Fiscal Funding, Inc. Neither company has any stock owned by a publicly-held company.

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PETITION FOR WRIT OF CERTIORARI

Calvin Grigsby respectfully petitions for a writ of certiorari to review the decision of a panel of the Eleventh Circuit Court of Appeals.

OPINIONS AND ORDERS BELOW

The panel decision for which the writ of certiorari is requested is *Fiscal Operations, Inc., and Calvin Grigsby v. Miami-Dade County, et al.*, 99 Fed.Appx. 880 (March 2, 2004), found at Appendix ("App") A at 1a through 3a. The Court of Appeals decision denying the petition for rehearing is App. E at 64a through 66a. The District Court decisions which the panel

reviewed are App. B at 4a through 24a, App. C at 25a through 43a, and App. D at 44a through 63a.

BASIS OF JURISDICTION

The panel decision and judgment for which review is sought was entered March 02, 2004.

An order denying the petition for rehearing was entered April 28, 2004.

28 U.S.C. § 1254 confers jurisdiction on this Court to review this decision by writ of certiorari.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves: 42 U.S.C. § 1983 (App. G at 70a); the Fourth Amendment to the United States Constitution (App. H at 71a); and the Fourteenth Amendment to the United States Constitution (App. J at 73a through 74a).

STATEMENT OF THE CASE

The Course of Proceedings

Calvin Grigsby, the principal of a private company which had managed and operated the gantry cranes used in loading and unloading ships in Miami's commercial port, filed an action against the Miami-Dade County Attorney, Steven B.

Bass, his employer, and others under 42 U.S.C. § 1983, alleging that Bass and the others had instigated a malicious federal prosecution of Grigsby by supplying federal prosecutors with false evidence and withholding truthful evidence. Grigsby's complaint states that the falsity of the evidence, along with the evidence that was withheld, came out during the prosecution, which ended with a judgment of acquittal at the close of the government's case.

Grigsby's complaint alleges, *inter alia*, that the instigation of the prosecution resulted in a continuing seizure of Grigsby under the Fourth and Fourteenth Amendments to the United States Constitution and provides details of the seizure.

The district court, granting motions to dismiss, held that Bass was entitled to absolute immunity from this claim because supplying information to federal prosecutors was "associated with his role as an advocate of the County." With respect to the claim, itself, the district court said that "there is a clearly-established constitutional due process right not to be subjected to criminal charges on the basis of false evidence" but then dismissed the claim under Fed. R. Civ. Proc. 12(b)(6), refusing to entertain the "continuing seizure" concept. The appellate panel affirmed the district court per curiam.

The Relevant Facts

[On a motion to dismiss, the facts are the allegations of the complaint.]

Bass and others presented the Federal Bureau of Investigation and other representatives of the United States Attorney's office with fabricated evidence that Grigsby used "County Money" and "Public Funds" to make unauthorized expenditures not directly related to crane operations. This

fabricated evidence resulted in the malicious prosecution of Grigsby for theft of public funds and the attendant seizure of Grigsby.

When Bass and others fed this charge to the federal authorities, they had exclusive and superior knowledge of the design and history of the underlying franchisee/independent contractor relationship between Grigsby and the County -- information which would have demonstrated to the federal investigators that the "public funds" assertion was false. Instead of presenting this information honestly, they withheld the pertinent facts and gave the authorities only selective information, thereby misleading the investigators and the prosecutors, who then misled a grand jury. This produced a malicious prosecution that was doomed to fail eventually. (Complaint, Para. 47-48, 73-75) (App. K at 92a through 93a and 100a through 101a).

Examples of the fabricated evidence included an internal report from another defendant, Kathy Jackson. Jackson's report falsely stated that "Public Funds" were spent for political contributions, professional services of no value, meals and entertainment with no business purpose, and personal items. The report did not disclose that any such expenditures were made by Grigsby's company out of its own funds, usually in response to County demands, and were documented and fully disclosed by the company to the County. The report also did not disclose that Alex Penelas and Miriam Alonso (two other defendants) had both chaired the County's Maritime and Trade Committee and were both well aware of the manner in which County officials took advantage of Grigsby's company and others working at the Port to obtain private funds for a wide range of "pet projects" of County Commissioners. (Complaint, Para. 50, 31, 32) (App. K at 93a, and 86a through 87a).

The fabricated evidence also included a false statement of the seaport's books, procured by Bass and others from Deloitte & Touche (another defendant) solely to aid in instigating the prosecution. The false statement contradicted many years of financial statements to the contrary. The real financial statements, which Bass and the others withheld from the prosecutors, came out later during the government's case. (Complaint, Para. 40, 41, 51) (App. K at 89a through 90a and 93a through 94a).

The prosecution resulted in a judgment of acquittal at the close of the government case, after all of the withheld evidence was exposed. The judgment specifically stated that the "Public Funds" assertion "ignores established principles of agency, the terms of the 1988 Agreement, the manner in which both Fiscal and the County treated and reported revenues, and Florida law pertaining to obligations under a contract." The judgment also detailed many examples of the role of County officials in directing most of the alleged improper expenditures that Bass and the others used as a pretext to instigate the prosecution. (Complaint, Para. 35) (App. K at 88a).

As a result of the instigation of this malicious prosecution, Grigsby was forced to surrender his person to authorities, to satisfy bail requirements, to surrender his passport, to report to a pretrial services unit on a weekly basis, to appear in court for many days over many months, to suffer severe loss of business and employment opportunities, to suffer severe reputational harm, and to experience the severe financial and emotional strain of preparing and presenting a defense to the fabricated charges. (Complaint, Para. 82) (App. K at 103a).

REASONS FOR GRANTING THE WRIT

1. The Court should grant the writ to insure that lower courts will entertain the Fourth Amendment "continuing seizure" concept discussed in *Albright v. Oliver*.

Grigsby laid out, in detail, a fabrication of evidence claim, explaining how Bass and others created and transmitted to federal authorities false evidence (e.g., the Jackson "special" report and the Deloitte "restated" accounting treatment) and withheld other evidence which would have demonstrated that the proffered evidence was false (e.g., the fifteen year prior accounting and audit history, the design and history of the business relationship, the role of County officials in demanding most of the expenditures which were identified as "improper," and his company's meticulous documentation of every such expenditure in its own books, for the County's review), thereby misleading federal investigators and prosecutors who, in turn, misled a grand jury. When the evidence that Bass and the others withheld came out during the presentation of the government's case, the prosecution collapsed. The court entered a judgment of acquittal at the close of the government's case. But in the meantime, for months, Grigsby was seized and restrained, forced to surrender his person to authorities, satisfy conditions of bail, surrender his passport, report to pretrial services on a weekly basis, and appear and defend in court all day, for many days, at great personal and financial cost.

The district court and the appeal panel accepted the fundamental principle that "there is a clearly-established constitutional due process right not to be subjected to criminal charges on the basis of false evidence" (App. B at 19a)but then dismissed Grigsby's Fourth Amendment claim that he was subjected to a "continuing seizure" caused by the fabricated

evidence. Here is the claim, as it was presented in the complaint:

COUNT 4
UNREASONABLE SEIZURE AND RESTRAINT (FOURTH AND FOURTEENTH AMENDMENTS)
(Grigsby v. All Defendants)

80. The allegations of Paragraphs 1 through 58 and 73 through 79 are incorporated here by reference.

81. Using deliberately fabricated selective evidence while withholding the underlying pertinent facts, the Defendants deceived the prosecutor into believing that probable cause existed and proximately caused the deception of the grand jury, the initiation of a prosecution that was not backed by probable cause, and an unlawful seizure and restraint of Grigsby.

82. As a consequence of the wrongful actions of the Defendants, Grigsby was unlawfully seized and restrained (i.e., seized and restrained without probable cause) in that he was forced to surrender his person to authorities, to satisfy bail requirements, to surrender his passport, to report to a pretrial services unit on a weekly basis, to appear in court for many days over many months at the Government's command, to suffer severe loss of business and employment opportunities, to suffer severe reputational harm, and to experience the severe financial and emotional

> strain of preparing and presenting a defense to the fabricated charges.
>
> 83. Grigsby has been severely injured by this unlawful seizure and restraint, in violation of his Fourth and Fourteenth Amendment rights, and he is entitled to an award of compensatory damages from each of the Defendants, according to proof, in amounts to be established at trial.
>
> 84. In taking this egregious action, the Defendants were motivated by malice and have acted with reckless indifference to the Constitutional rights of Grigsby, and Grigsby is entitled to an award of punitive damages, from each of the Defendants, according to proof, in amounts to be established at trial.

(App. K at 102a through 103a).

This claim arises out of, and follows, the discussion of this Court in *Albright v. Oliver*, 510 U.S. 266 (1994). In her concurring opinion, Justice Ginsburg agreed with the plurality that a malicious prosecution claim is properly analyzed under the Fourth Amendment and then wrote separately to discuss the "seizure" concept further. Reviewing common law sources, Justice Ginsburg concluded that:

> The common law thus seems to have regarded the difference between pretrial incarceration and other ways to secure a defendant's court attendance as a distinction between methods of retaining control over a defendant's person, not one between seizure and its opposite.

> This view of the definition and duration of a seizure comports with common sense and common understanding. A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.
>
> A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant released pretrial is not still "seized" in the constitutionally relevant sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and answer the state's charges. He is equally bound to appear, and is hence "seized" for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court.

Albright at 278, 279.

With respect to when such a claim arises, Justice Ginsburg stated:

> Once it is recognized ... that Albright remained effectively "seized" for trial so long as the prosecution against him remained pending, and that Oliver's testimony at the preliminary hearing, if deliberately misleading, violated the Fourth Amendment by perpetuating the seizure, then the limitations period should have a different trigger. The time to file the § 1983 action should begin to run not at the start, but at the end of the episode in suit, *i.e.*, upon dismissal of the criminal charges against Albright. See *McCune v. Grand Rapids*, 842 F.2d 903, 908 (CA6 1988) (Guy, J., concurring in result) ("Where ... innocence is what makes the state action wrongful, it makes little sense to require a federal suit to be filed until innocence or its equivalent is established by the termination of the state procedures in a manner favorable to the state criminal defendant.").

(*Id.* at 280).

Albright, himself, abandoned his Fourth Amendment claim in the district court and did not attempt to reassert it in this Court.[1] In Justice Ginsburg's view, however, the claim was

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1 Justice Ginsburg's opinion notes that Albright acquiesced (incorrectly) in a view that the statute of limitations would begin at the start of the episode rather than the end (*Id.* at 280) and "may have feared the court would narrowly define the Fourth Amendment's key term 'seizure'" (*Id.* at 277).

"neither substantively deficient nor inevitably time barred." (*Id.*)[2]

Justices Stevens and Blackmun, in an opinion dissenting from the plurality's main holding that a malicious prosecution must be examined only under the Fourth Amendment, included this statement in a separate comment directed to Justice Ginsburg's concurring opinion: "[We] agree with her explanation of why the initial seizure of petitioner continued until his discharge and why the seizure was constitutionally unreasonable." (*Id.* at 307). No justice expressed any disagreement with that portion of her opinion.

Count 4 of Grigsby's complaint states a Fourth Amendment cause of action against Bass and the others under the "continuing seizure" approach discussed above. That count should not have been dismissed for failure to state a claim. On *de novo* review, this Court should grant the writ and reverse that dismissal in order to insure that the lower courts do not undercut the "continuing seizure" concept.

2. The Court should grant the writ to reverse a sharp departure from this Court's instructions with respect to absolute prosecutorial immunity.

The district court accepted the complaint's allegation that "Bass presented the Federal Bureau of Investigation and

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2 Grigsby's claim is not time barred, either. The judgment of acquittal at the close of the government's criminal prosecution came on June 7, 1999. Grigsby filed his original complaint November 26, 2001 and amended it on February 20, 2002. The applicable Florida statute of limitations is four years.

representatives of the U.S. Attorney's office with evidence that Grigsby used County money and public funds to make unauthorized expenditures not directly related to crane operations" (App. B at 9a) but then concluded erroneously that supplying information to federal prosecutors was "associated with his role as an advocate of the County." (*Id.* at 13a).

This flatly contradicts this Court's governing precedents defining the "advocacy" function for immunity purposes. See, e.g., *Buckley v. Fitzimmons,* 509 U.S. 259, 274 (1993) (even criminal prosecutors handling a case are not absolutely immune from a charge of fabricating evidence during the pre-trial indictment stage); *Kalina v. Fletcher*, 522 U.S. 118, 130-31 (1997) (a deputy prosecutor charged with making false statements of fact in support of an application for an arrest warrant is not absolutely immune); *Burns v. Reed*, 500 U.S. 478, 493 (1991) (a prosecutor advising the police in the investigative phase of a criminal case is not absolutely immune).

In such cases, this Court has drawn a sharp distinction between "advocacy" functions (e.g., preparing for trial, evaluating evidence, trying the case) which are absolutely immune and "investigatory" functions aimed at determining whether probable cause exists to take some action, which are not absolutely immune. This case falls into the latter category. Bass, who was not even a prosecutor, presented evidence to prosecutors during the course of their investigation to determine probable cause.

The district court and the appeal panel failed to draw the distinction that this Court directs. Bass was simply a complaining witness here, a functional category which this Court has expressly ruled out for absolute immunity purposes. See *Malley v. Briggs*, 475 U.S. 335, 340-41 (1986) (absolute

immunity does not extend to "complaining witnesses," those whose allegations serve to bring about a prosecution).

On appeal, the defense ignored these controlling decisions and, instead, directed the panel's attention to another decision of this Court, *Butz v. Econonomou* 438 U.S. 478 (1978). *Butz* is perfectly consistent with the decisions cited above. *Butz* holds that government attorneys and executive officials on the "advocacy" side of the line (i.e., performing prosecutorial functions or deciding to initiate litigation) are entitled to absolute immunity along with prosecutors. This does not help Bass, a complaining witness on the "investigatory" side of the line.

If allowed to stand, the panel decision in this case will establish a conflict between the 11th Circuit and the circuits who follow this Court's instructions.

CONCLUSION

The Court should grant a writ of certiorari to review the lower court decision *de novo* and reverse the dismissal of Grigsby's Fourth Amendment "continuing seizure" claim. The Court should also grant the writ to review the lower court's grant of absolute immunity to Bass and reverse that decision.

DATED: July 26, 2004

Respectfully submitted:

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